

Privatizing While Transforming

by Marion E. "Spike" Bowman

Overview

The Armed Forces of the United States are designed to be supported by capabilities provided by civilians. The Army, for example, depends not only on Reserve and National Guard components for warfighting elements, but also on private contractors for numerous roles no longer performed by military personnel. Originally working in small contingents focused on logistical functions, private contractors now rival military personnel in number in the battlespace. In addition to providing direct logistical support to the military, contractors perform equipment maintenance and reconstruction work, train military and police, and work as civil affairs staff, interpreters, and even interrogators. They also provide private armed security services. The issues arising from new roles are exacerbated by the growth of the contractor population in conflict zones at a pace that defies effective recordkeeping.

This rapid increase in the number of contractors has outstripped procedures meant more for acquisition of tangible objects than services. It has also placed private contractors in harm's way in a manner not envisaged in previous conflicts. Legal and regulatory schemes have been challenged and perhaps stretched beyond limits. The laws of war divide the world neatly into combatants and civilians, but on today's battlefields, the distinctions blur. Moreover, there are neither recognized nor logical rules of engagement for private individuals. The laws of armed conflict not only fail to accommodate armed private citizens, but also, in some instances, may treat them as unlawful combatants. Put simply, the requirements of the contemporary battlespace do not mesh well with procedures, regulations, and laws devised for a different era.

Growth of Privatization

The end of the Cold War exposed ethnic tensions and intra- and interstate rivalries that destabilized broad regions of the world. Neither the extent nor the nature of the resulting conflicts had been antici-

pated. In these conflicts, the battlespace is cluttered with large numbers of personnel and entities not previously seen as major players in conflict arenas. These include the United Nations and its many components, foreign governments, nongovernmental organizations (NGOs), a plethora of news media, and even private entrepreneurs who arrive without benefit of government sponsorship. The main driver of new entries in the battlespace is privatization of activities formerly performed by uniformed personnel.

In the United States, *privatization* means any shift of activities or functions from the state to the private sector and, more specifically, any shift of the production of goods and services from public to private. Especially where the privatized functions are military, this process has been contentious, as many argue that national security itself is being privatized.¹ However, it is beyond cavil that private military firms must provide the military with certain professional services intrinsically linked to warfare, which begs the question of what is and is not inherently governmental. The services to be provided often are ill defined until events unfold or technology changes. Although regulations for contracting these services are detailed, they leave significant issues to be resolved as they arise because the regulations were devised in another time and for purposes that do not always suit today's threat environment.

Probably the most significant change comes as a result of outsourcing some logistical needs previously provided by uniformed personnel. That outsourcing may be accomplished through NGOs, other governments, international organizations, or private contractors and may include outsourcing within the continental United States. This paper deals exclusively with the issues that have arisen from using private companies to support the U.S. military in a foreign conflict. For that purpose, Iraq will be the backdrop that illustrates the speed with which earlier practices of outsourcing have been overtaken by threats not contemplated only a few years ago. In this analysis, it will become apparent that the threat environment, at least partially transnational in nature, has created a security problem that confounds administration of privatized activities. The purpose of this paper is to illustrate

Report Documentation Page				Form Approved OMB No. 0704-0188	
Public reporting burden for the collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.					
1. REPORT DATE JUL 2007		2. REPORT TYPE		3. DATES COVERED 00-00-2007 to 00-00-2007	
4. TITLE AND SUBTITLE Defense Horizons. Privatizing While Transforming. July 2007, Number 57				5a. CONTRACT NUMBER	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S)				5d. PROJECT NUMBER	
				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) National Defense University, Center for Technology and National Security Policy, BG 20, Fort Lesley J. McNair, Washington, DC, 20319				8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)				10. SPONSOR/MONITOR'S ACRONYM(S)	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION/AVAILABILITY STATEMENT Approved for public release; distribution unlimited					
13. SUPPLEMENTARY NOTES					
14. ABSTRACT					
15. SUBJECT TERMS					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT Same as Report (SAR)	18. NUMBER OF PAGES 8	19a. NAME OF RESPONSIBLE PERSON
a. REPORT unclassified	b. ABSTRACT unclassified	c. THIS PAGE unclassified			

how the number and activities of private contractors have grown well beyond what had ever been contemplated, thereby leading to regulatory and legal issues that have yet to be addressed.

Since the end of the Cold War, millions who once would have worn a uniform are instead employed by private industry. Private corporations have penetrated Western warfare so deeply that they are now the second largest contributor to coalition forces in Iraq after the U.S. military.² To accommodate this dramatic change, defense transformation must contemplate more than modernization, network-centricity, and allied partnerships.

From Bosnia to Iraq, the United States has been learning to fight differently. In the process, the distinction between the contributions of soldier and civilian has blurred. Increasingly, military needs are met by private contractors whose employees are not far separated in function, and sometimes in appearance, from the military warrior. There are many reasons for this transformation of responsibility, ranging from the need to improve efficiency to sharply reduced force levels.

On June 6, 2005, the Department of Defense (DOD) issued its final rule addressing the treatment of contractor personnel supporting U.S. military forces outside the United States.³ Experiences in Afghanistan and Iraq drove some of the revisions to the older rule. The new rule applies when contractor personnel deploy with, or otherwise provide support in the theater of operations to, U.S. military forces deployed outside the United States in contingency operations, humanitarian or peacekeeping operations, or "other military operations or exercises designated by the combatant commander." A significant change to the rule was to replace the term *combat operations* with *military operations or exercises* to enhance flexibility. The rule also specifies that work may be required in "dangerous or austere conditions" and stipulates that the contractor "accepts the risks associated with required contract performance in such operations." It further states that contractor personnel are not combatants and are to take no role that would jeopardize their status.

Civilian support to the military is nothing new, even within a combat zone. Military forces have always depended on a support network of civilians to perform such necessary functions as feeding, clothing, and even equipping and training. Dependence on civilians has become ever more critical as increasingly high-tech equipment requires maintenance skills beyond military competence. Civilian support has been evident in Panama, Bosnia, Kosovo, Afghanistan, and, most notably, Iraq, where, in 2005, more than 60 firms employed some 20,000 non-Iraqi civilians in direct support of the military.⁴ Firms providing support for the contractors employ many thousands more. What has changed in recent years is the scale of privatization.

The changing nature of warfare drives much of the need for privatization. The United States is one of the few nations left with the capacity to wage conventional warfare on a large scale, but for that reason, unconventional and asymmetric warfare is the threat most likely to be faced simply because adversaries do not have a conventional capacity that can challenge U.S. forces. Increasingly, transnational threats of all types arise from nonstate actors, and standing military forces are

primarily designed to engage state actors. Among the most pressing considerations are:

Surge Capacity. With post-Cold War military forces greatly reduced, the ability to respond quickly through civilian augmentation can help meet national security needs.

In 1991, the U.S. Army complement, designed for a two-front war, was around 700,000, and Iraq was the only contingency in sight. Moreover, effective diplomacy had assembled a broad-based coalition of supporting nations. In contrast, by 2004, troop strength had been reduced by one-third, and coalition support had shrunk. Furthermore, by 2003, the United States faced other challenges: combat in Afghanistan, in particular, but also instability in the Balkans and Somalia and nuclear posturing in North Korea. Also by this time, DOD capabilities had been refocused on core competencies for warfighting, and mundane tasks were targeted for outsourcing.

Because conflicts can erupt suddenly, the ability to gather the logistical, support, maintenance, and related capabilities that sustain a fighting force must be readily available. Much of this capability has been removed from the standing forces, so a significant part of U.S. military surge capability today derives exclusively from the private sector.

Iraq provides an example of how that surge capability functions in the contemporary battlespace. As conflict loomed in 2003, it was clear that combat in Iraq would entail private industry capabilities. In February of that year, anticipating the need for reconstruction efforts, the U.S. Agency for International Development (USAID) issued an urgent request for proposal (RFP). Contractors contacted were prequalified based on proven capacity to undertake nationwide infrastructure repair and ability to comply with complex Federal regulations.⁵

Speed. Private industry is generally able to respond more quickly than a government bureaucracy. Moreover, the nature of warfare demands that military decisions be made deliberately and cautiously. In part because of size, but also in large measure because of the seriousness of military missions, DOD bureaucracy is layers deep. It is designed this way for efficient but disciplined application of force when required to act, not for agility. Even within the U.S. Government, DOD often has a bureaucratic stranglehold on interagency processes because of its size and the amount of internal coordination required to reach a decision.

Compounding bureaucratic inertia, the United States significantly underestimated the condition of the Iraqi infrastructure and the looting that war would loose. These unrealistic expectations may have been due, in part, to the fact that the Iraqi public was among the best educated of the Arab nations and the infrastructure once had been well developed. Nevertheless, it was clear from the start that a great deal of external effort and resources would be required to sustain the infrastructure. The oil industry alone was presumed to require substantial investment to resume full production, and much of the reconstruction focus was on that industry because it was assumed that oil production would help pay reconstruction costs.

The United States is the only nation that makes stabilization and reconstruction a core competency, yet reconstruction and stabilization needs may fall outside any competency that the military carries into battle. That is where private industry comes in. What private industry can do well is pull together highly qualified people for specific purposes and task-organize them for optimal use. That capability is an enormous national security resource that cannot easily be duplicated within a government workforce.

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Skills. Technology has improved warfighting capability and capacity, but it comes at a cost. Today's weapons systems have become so technologically advanced that specialist maintenance, if not operation, may require a draw from the private sector. Additionally, technological advances are so rapid and dramatic that keeping a pool of personnel with the required skill sets within the warfighting force or elsewhere in the government is almost impossible. Private industry offers salaries, and frequently challenges, that are simply not available within government structures.

Cost. Cost is an important factor in determining whether to outsource a function, but it is not easily quantified or compared. The private sector has a reputation of doing things more cheaply and more efficiently than the government, but there appears to be little hard data on the value of outsourcing. Additionally, the proliferation of no-bid and cost-plus contracts brings the value factor into question. Finally, value and cost are not necessarily correlated.

Aviation assets are a convenient example of the cost/value dichotomy. It is generally true that private industry flies cargo and people more cheaply than does the U.S. Air Force, but cost is not always the determinant. Flying into combat zones or at low level over hostile terrain is not normally a civilian skill. Nevertheless, even national security missions may be best accomplished by civilian agencies. When the U.S. Embassies in Kenya and Tanzania were attacked in 1998, it was cheaper and more reliable to charter civilian aircraft to ferry Federal Bureau of Investigation personnel to the scene and retrieve some three tons of debris for forensic analysis than it was to use military aircraft.

An additional consideration is long-term versus short-term cost. Because of capital investments, it may be more cost-effective to pay large sums to a contractor for a short-term requirement than to develop a capability to perform the same task, especially if the service is needed only occasionally. At any time, there may be a requirement for an enhanced skill level that exceeds what is normally found in government service. In that case, value would outweigh cost determinants and favor a civilian capability to satisfy mission requirement.

Flexibility. Especially for short-term requirements, outsourcing not only may be faster and cheaper, but also may be more easily terminated than creating the capability within the government. Flexibility is a combination of all the preceding factors and more; it is a quality that the warfighter and the crisis responder need to accomplish the mission.

Cost, speed, and other factors may be extremely important items when considered individually, but every crisis situation will be different. What proves to be most effective and in the best interests of a government mission in one situation may not be in the next. The military commander (or a civilian crisis responder counterpart) may require flexibility to adopt a new solution to a problem that was handled differently (and correctly) in the past. Being able to turn to a civilian competency, or to reject one used in other situations, may be a core requirement itself.

Privatization in Iraq

It is widely recognized that work performed by American companies in Iraq, particularly reconstruction activities, has not gone well. The Committee on Government Reform in the U.S. House of Representatives has been wrestling with privatization issues in Iraq since 2004. On September 28, 2006, the committee held the fourth in a series of public hearings. In his opening statement, Chairman Tom Davis (R-VA) stated that "Poor security, an arcane, ill-suited management structure, and a dizzying cascade of set-backs have produced a succession of troubled acquisitions."⁶ Typical of the projects reviewed in that hearing were a children's hospital in Basrah that was a year behind schedule and \$50 million over budget, a project to build 150 primary health care centers that was so poorly managed that the contract was modified to call for only 20, and water projects that were chronically over budget and behind schedule.

Some of these shortfalls had been chronicled earlier. A report by the Center for Media and Democracy⁷ (CMD) made some highly critical claims. Among CMD findings:

U.S. Contractors in Conflicts

Conflict	1991 Gulf War	Bosnia	Kosovo	Iraq/Operation <i>Iraqi Freedom</i>
Contractors ¹	9,200	1,400	10,000–15,000	100,000 ²
Military	541,000	20,000	50,000 (Kosovo Force total)	140,000
Type of Support		Examples		
Support to military forces		Food preparation (Kellogg Brown and Root), laundry, equipment maintenance		
Restoration of services		Water, sewer, power, transportation, bridges, railways, airfields (Bechtel, Fluor)		
Construction/reconstruction		Major facilities, hospitals, schools, oil refineries (Bechtel, Haliburton)		
Civil affairs		Food distribution, training, election support, media (Fluor, DynCorp, Northrop Grumman)		
Intelligence		Analysis of improvised explosive device attacks, attacks on officials, primary danger areas (Kroll)		
Security		Protection of officials, construction sites, housing areas, convoys, other contractors (Blackwater, Kroll)		
Miscellaneous		Interrogation, interpretation, judicial training, legal support (L-3, Global Linguistics, CACI, Systex)		

¹ Numbers are estimates, as there is no single point that collects data on contractors supporting deployed troops. These numbers were drawn from Renae Merle, "Census counts 100,000 Contractors in Iraq," *The Washington Post*, December 5, 2006, D1; and Deborah D. Avant, "The Privatization of Security: Lessons from Iraq," *Orbis* (Spring 2006), 327–342.

² Of the 100,000 contractors in Iraq, 48,000 work as private soldiers. Jeremy Seahill, "Bush's rent-an-army," *Los Angeles Times*, January 25, 2007, A23. No doubt many of the remaining 52,000 are indigenous Iraqis employed in the reconstruction effort.

■ Despite over 8 months of work and billions of dollars spent, key pieces of Iraq's infrastructure either have not been repaired or have been fixed so poorly that they do not function.

■ Tens of millions of dollars had been allocated to repair Iraq's schools, but many schools had not been touched, and several that supposedly had been repaired are in shambles. One "repaired" school was overflowing with unflushed sewage. A teacher at the school also reported that "the American contractors took away Japanese fans and replaced them with Syrian fans that don't work"—and billed the U.S. Government.

■ Inflated overhead costs and a Byzantine maze of subcontracts have left little money for the everyday workers carrying out projects. In one contract for police operations, Iraqi guards received only 10 percent of the money allotted for their salaries. Indian cooks for Halliburton subsidiary Kellogg Brown and Root⁸ reported making just \$3 a day.

CMD also alleged that, of Halliburton's \$2.2 billion in contracts, only about 10 percent has gone to meeting community needs, the rest having been spent on servicing U.S. troops and rebuilding oil pipelines. CMD also said Halliburton has spent over \$40 million in the unsuccessful search for weapons of mass destruction. The report concludes harshly: "The politics and process behind these deals have always been questionable. Now we have firsthand evidence that they're not even doing their jobs."⁹ As noted below, the fact that particular jobs are not being completed is probably due, in part, to unanticipated security concerns.

When the Special Inspector General for Iraq Reconstruction (SIGIR) testified before the House Government Reform Committee, he was somewhat less pessimistic.¹⁰ He found that some 80 percent of more than \$300 million in contract work examined had been performed within contract specifications.¹¹ Nevertheless, he found fraud, waste, and abuse, referred 25 cases to the Department of Justice, and had 89 open investigations. Specifically, he found that both contractor performance and U.S. Government management actions were factors in the failure to complete the Public Healthcare Centers project as planned. The Special Inspector General reported that he had been told by the U.S. Army Corps of Engineers that the contractor:

- lacked qualified engineering staff to supervise its design work
- failed to check the capacity of its subcontractors to perform the required work
- failed to supervise properly the work of its subcontractors
- failed to enforce quality assurance and quality control activities.

SIGIR auditors investigated and subsequently identified:

- a lack of complete government response to contractor requests for equitable adjustments and excusable delays based on unplanned site conditions, design, or scope changes, or delays based on site access restrictions or security
 - high government personnel turnover and organizational turbulence
 - failure to follow required procedures for making contract changes
 - poor cost controls
 - poor cost-to-complete reporting
 - failure to execute its administrative responsibilities properly
 - failure to establish an adequate quality assurance program.

While the SIGIR did not dispute the Corps' list of contractor problems, he believed that the Federal Acquisition Regulations provided

sufficient controls to ensure that the government receives goods or services at a fair and equitable price. What was missing was adequate oversight, planning for contingencies, and development of a reserve competency for contingencies. These inadequacies are sufficiently serious that the SIGIR report may err in marginalizing them.

Reviewers have found that millions have been expended to essentially no effect because of long lag times between mobilization of private contractors and the beginning of construction projects. This was often partially due to political changes on the ground in Iraq and poor planning on the part of the government. SIGIR found poor response by government agencies to contractor requests for scope and design changes, high turnover of agency personnel, poor cost controls and reporting, and quality assurance gaps. On the contractor side, he found shortages of qualified engineering staff, insufficient research to ensure that subcontractors were qualified, and burgeoning security problems.

The State Department found that, in many cases, agencies moved forward on projects without finalizing terms and conditions of the contract, leaving contracting officers with an understanding that they had limited or no ability to recover costs when things went badly.¹²

Many issues of competency and fraud have yet to be addressed. Private companies have paid millions in fines to resolve allegations of bid rigging, fraud, delivery of faulty military parts, and environmental damage.¹³ Regardless of the offense, once the fines are paid, the contractors are eligible to go back to work immediately. The United States is paying more than \$780 million to a British firm convicted of fraud on three reconstruction contracts. Many of the offenses were by subcontractors, but that still begs the question of oversight. Indeed, the SIGIR found that oversight was so lax that widespread abuse was likely. In turn, that raises the issue of responsibility for needed oversight.

At least in some cases, privatization can lead to massive layoffs and increased unemployment among an indigenous population as jobs are allocated to external companies. This is of special concern in Iraq. World Bank data indicate that 41 percent of Iraq's population is under 14 years of age. Furthermore, Iraq's labor force increased by 88 percent between 1980 and 2001. Given the high percentage of young people in Iraq, the World Bank expects the labor force to increase by an additional 30 percent by the end of this decade.

Security in Iraq

Figure 1 illustrates a security cost not imagined in 2003. By 2004, the environment was so hostile that some 20,000 private security guards were in Iraq.¹⁴ That statistic, startling in 2003, pales by comparison to 2006, when 181 private, multinational military firms supplied some 48,000 security personnel in Iraq.¹⁵ The cost of private security personnel can be as high as \$33,000 per person per month.

Security personnel are vulnerable.¹⁶ Various nonmilitary sources have counted at least 312 American security contractors killed in Iraq.¹⁷ All told, an estimated 650 private contractors have died in Iraq. There are approximately 100,000 in the workforce, but the numbers are soft and do not adequately account for Iraqi subcontractors and employees.¹⁸

On March 31, 2004, four Americans working as private security personnel for Blackwater were ambushed and killed in Fallujah. Three years later, the identity of the prime contractor remains unknown. Blackwater initially believed it was Kellogg Brown and Root. ESS Sup-

port Services Worldwide told a House Committee it was Fluor Corporation, but Fluor Corporation disputes that.¹⁹ Although for purposes of this study the identity of the prime contractor is not critical, it should be a source of some concern that such information is not readily available. Of much greater significance is the fact that those four deaths resulted in a second battle of Fallujah as Army and Marines reclaimed the city. This incident clearly indicates how the presence of civilians on the battlefield can have a profound effect on events.

The United States intended reconstruction as a Marshall Plan for Iraq. Clean water, communications, sanitation, and power were intended to win the hearts and minds of the Iraqi people, but insurgents attack the infrastructure under construction or newly completed to convey that the people will never get the intended benefits as long as the allies are present. This is having a profound effect. Bechtel got its first contract in 2003 but announced in 2006 that it would be pulling out. Dozens of Bechtel's employees and subcontractors have been killed, some were kidnapped, and others marched out of their office and shot. Many others were wounded. Money intended for reconstruction was diverted to security, significantly changing the profit/risk ratios.²⁰

The modern military capability of the United States is designed to be supported by private industry. The standing Army has been designed to go into combat by integrating Reserve and National Guard components as warfighting elements and by outsourcing support services. The absence of a robust private support mechanism can be devastating to the military mission. Outsourcing key support functions to private industry made sense in the 1990s. Today, however, the challenges of Iraq and Afghanistan call into question the continued viability of assumptions made in a bygone era. If firms such as Bechtel are pulling out, how many other private suppliers will follow? These and other developments in Southwest Asia raise the question of how well prepared we are to sustain this type of privatization.

Issues

If privatization is to remain a cornerstone of U.S. military preparedness, there are regulatory and legal issues that need to be addressed because privatization activities are well out in front of legal competencies. Legal avenues exist for the government, but in an ideal world, private industry would step up to the plate and participate in crafting new regulatory processes. Private industry can do much to make its offerings more attractive and more responsive, and the government can do much to focus responsible spending. In all likelihood, the most efficacious approach would be a combination of government and industry effort that involves regulation, a fresh look at contracting procedures, and a new evaluation of the legal conventions that regulate status in combat situations.

Industry Regulation. While a fresh look at the regulatory process seems to be called for, it would be a mistake for the government to throw new regulations at the issues without considerable input from private industry. In all likelihood, it would also be a mistake for the government to assume a unilateral burden of regulating private military contractors. Rather, self-regulation by industry should be part of the solution. This could start with identification by private industry of best practices that would aid in adopting standards. Additionally, as a measure of employee performance, private military contractors would benefit from adoption of a code of conduct that would be worked out between

the government and private military contractors. Private industry should also have adequate mechanisms to oversee subcontractors.

Those recommendations for self-regulation and a code of conduct cannot be developed overnight, but they should be given encouragement and a chance to work. Private military contractors should be given the opportunity to begin the process before institutional changes are made. In the meantime, the government should work to solve problems with the governmental system in a stair-step process.

On the government side, a first step would be to ensure that RFPs are both detailed and clearly articulated so that industry will understand exactly what will be required in performance of a contract. This should also entail a fresh look at contracting in general to account for the increasingly large number of RFPs for personal services rather than products. A second measure would be to ensure that contracting and procurement offices are part of both pre- and postconflict planning. These specialists in the planning processes are the government officials closest to private industry and are the most likely to understand the possibilities and problems of using private industry in a conflict environment.

Once private industry and government reflection have matured, the government should develop an accreditation process for private military contractors. Current practices allow for prequalification of contractors for anticipated needs, but this process would help to soften the image that developed early in the war of having let no-bid contracts. It would also help to identify the individual strengths of the increasingly large number of private military contractors and might be a vehicle to track industry performance.

Government Regulatory Process. Government stewardship of public money clearly has not been satisfactory in Iraq, and procedures must be adapted to new circumstances.

Regulation and oversight: Every government and private study has concluded that a lack of adequate oversight has been among the faults found by inspections and audits. Just as private industry should examine itself in light of a changing way of doing business for the government, the government should also examine its methodologies for overseeing expenditures of public funds.

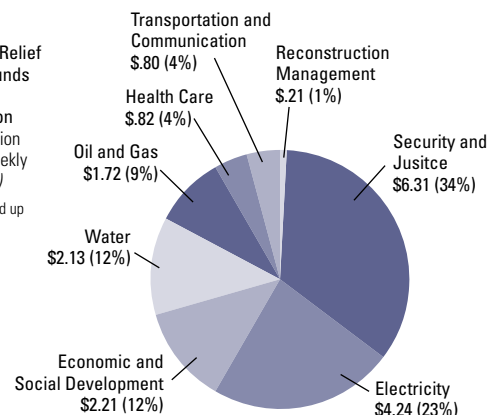
Partnering with private industry: Recognizing that there are significant issues associated with involving private industry in the government planning processes—at least in advance of letting a contract—government should explore innovative ways to partner with private industry such that both government and industry would ben-

Figure 1

Sector Shares of Iraq Relief and Reconstruction Funds
\$ Billions
Percent of \$18.44 Billion

Source: Iraq Reconstruction Management Office, Weekly Status Report (1/2/2007)

Note: Percentages do not add up to 100% due to rounding.



efit from requirements and capabilities more transparent to both. Of course, competition requires that private industry guard its information and processes, so government and industry should work together to develop an honest-broker methodology for private industry to follow in order to better align requirements and capacity.

Government should also periodically examine the effects and results of sole-source and limited-competition bidding. Similar to an accreditation process, a periodic reexamination of these contracts would help the government to achieve a best practices methodology.

SIGIR recommendations: The SIGIR came up with specific recommendations that would be of benefit in a fast-paced environment such as Iraq. These included an enhanced Contingency Federal Acquisition Regulation (CFAR) created by an interagency working group and implemented by legislation. The SIGIR also recommended legislation to institutionalize smaller-scale contracting programs to ease the burdens of contracting for smaller projects. In general, these recommendations recognized that the world of the CFAR and the world of conflict environments are different and that a regulatory process, along with a reserve of contingency personnel for contracting and oversight, is needed.

A U.S. Government mission: Beyond the contracting phase, the government needs to engage all elements of government and private industry involved in stabilization and reconstruction projects to prioritize performance. In Iraq, the military, the Coalition Provisional Authority, and USAID all had major reconstruction projects but did not coordinate or prioritize with each other. An Iraqi complaint was that U.S. officials made decisions without engaging Iraqis, “and the decisions were wrong.”²¹ Whatever ground truth is, a better means of coordinating and accounting for priorities is in order—but that leads to a core legal issue.

Legal Issues. Legal issues, as opposed to regulatory issues, are perhaps the thorniest of the problems that need to be addressed.

Inherently governmental: The first issue that needs attention is what functions may be contracted out. By definition, that which is inherently governmental is not amenable to privatizing. Although not yet raised as a confounding issue, there has to be some mechanism by which inherently governmental functions may be assessed. Those functions that cannot be subjected to private decisionmaking must be performed by government personnel. In a conflict zone, that might mean delivery of food could be contracted but delivery of ammunition could not, although in some circumstances food may mean survival, and in others, ammunition may not be associated with urgency. Similarly, collection and production of intelligence might be inherently governmental, but there is no reason why that should be so in all circumstances. Standards for assessing what is inherently governmental need to be developed and applied against contracting for private services and geared to the precise environment in which services are needed.

Presently, there is little to guide one in determining what is inherently governmental. The Federal Activities Inventory Reform Act of 1998 (P.L. 105–270) defines *inherently governmental* as activities “so intimately related to the public interest as to mandate performance by government personnel.” This generally means activities that require the exercise of discretion in applying Federal Government authority or the making of value judgments in deciding for the Federal Government. Although helpful, this definition is necessarily incomplete. When it is clear that value judgment is part of the equation, it is equally clear that

there can be no definitive a priori determination of what is and is not inherently governmental that can serve future needs.

Failure to perform: Closely related, and sometimes co-extensive, is the arcane discipline of government contract law. Contract law is most useful when the contractor is providing a product, but much of what is contracted for today is personnel services. While contractors can generally be fined for failure to perform, that is a postevent remedy and one not well suited to the needs of a commander in a conflict environment. In addition, failure to perform a required duty may be due to a perception of danger that is not shared by the military. It is not clear that there is a remedy for that situation, which has arisen in Iraq. Furthermore, in a case such as this, the importance of the function to the mission must be evaluated; if it is found to be essential, the question then arises as to whether it is one that should be contracted out.

Contractor conduct and training: The next major issue is that of discipline and contractor conduct on the battlefield. Unregulated by the military, private military contractors often enter the battlespace without coordinating, thereby exacerbating security issues in a constantly tense environment. Furthermore, allegations of misconduct, including rape and murder, have been made against private military contractors.²² Video clips suggest that contractors for a British company fired at civilian vehicles. Private contractors are being used as interrogators, but standards for proficiency do not exist. Many security personnel come from nations in which background information on them is difficult or impossible to find. Additionally, many private security personnel are poorly trained; contractors have frequently had to replace security personnel for poor performance. At the very least, standards for background investigations for individuals working directly for Federal purposes need to be crafted. Moreover, the growth of private security personnel in conflict areas around the world fairly begs for international standards for training and experience.

Failure of civil remedies: Another arena for legal concern is that of remediation—both civil and criminal. Discipline in a conflict environment is necessary for effective management by the military commander, and the rapid increase of contractor personnel in the battlespace must not interfere with that need. Additionally, if the military commander is responsible for the safety of contractor personnel, those personnel should be responsive to that commander's direction and accountable in some way for the commander's needs. Fines and ejection may be available remedies, but punitive measures may also be desirable for deterrent purposes. If disciplinary measures were available, that would seem to require a governmental mechanism for oversight, too.

Inadequate criminal remedies: The war on terror has also placed new strains on traditional measures of criminal remediation. When the military is abroad, criminal accountability is governed by the Uniform Code of Military Justice (UCMJ), the War Crimes Act, and the Military Extraterritorial Jurisdiction Act of 2000 (MEJA). Of these, the only one over which the military commander has traditionally exercised jurisdiction and competency is the UCMJ, the jurisdiction of which over civilians has constitutional implications.²³

This is particularly important; contractors in Iraq have been accused of a range of abuses and violations of both domestic and international law. The Coalition Provisional Authority granted foreign contractors immunity from Iraqi law while working within the boundaries of their contracts, a rule still in effect today.²⁴ The MEJA provides for

civilian court jurisdiction over significant offenses, but witnesses and evidence may be difficult to provide in a U.S. District Court thousands of miles from the locus of the activity. Furthermore, in a conflict environment, discipline and interaction with the indigenous populace are important to the success of the mission, and MEJA holds no remedy for social ills, insubordination, and absence from duty for civilians. The question is whether private industry can sufficiently regulate its personnel to accommodate military needs, or whether limited legislation is needed to address those issues that have not been preempted by the Supreme Court.

At least some in Congress apparently believe that change in the law is necessary. A tiny clause was slipped largely unnoticed into the Pentagon's fiscal year 2007 budget. One section of the UCMJ has, for many years, provided jurisdiction *in time of war* over persons "serving with or accompanying an armed force in the field." The addition of six words—"declared war or a contingency operation"—may have altered the landscape considerably.

Under the UCMJ, commanders have wide latitude in deciding who should be prosecuted, but not all military crimes have civilian parallels—for example, in civil society, disobeying an order, fraternization, and adultery all may have consequences, but not criminal ones. Winning hearts and minds is a reason for discipline on the battlefield, but attempting to hold civilians to the same standards as U.S. troops will be messy and is likely to raise constitutional challenges. For one thing, civilians prosecuted in military court would not receive a grand jury hearing or be tried by a jury of their peers.

Historically, the Supreme Court has been hostile to trying civilians under military procedures, and no conviction of a civilian under the UCMJ has been upheld in more than half a century. On the other hand, considerable time has passed since this was an issue, and the military justice system has more protections than it did 50 years ago—in fact, some matters, such as warning against self-incrimination, are more robust for military personnel than for civilians.

One of the most vexing issues that will arise will be determining whom the new provision applies to. Although it is intended only to hold contractors accountable, there are so many people on the battlefield today that it is unclear who, precisely, is serving with or accompanying the force. Contractors with the military seem an easy determination, but what about security guards hired *not* to perform services for the military, but instead to protect those who are providing those services? And what about contractors to other agencies who also occupy the battlespace, such as USAID? Clearly there will be issues as to whether those six words include employees of other government agencies. And what about reporters, some of whom are embedded with military units?

Christopher Anders, legislative counsel for the American Civil Liberties Union, argues that the legislation was crafted so broadly that it could have negative consequences. As he puts it, "Soldiers subject themselves to a different system of criminal justice. . . . There may be some logic in applying military standards to civilian military contractors who are taking up arms. But it's a whole different thing when others are swept up."²⁵

Discipline in the battlespace: Following directly from the issue of the applicability of the UCMJ to civilians is the troublesome issue of control of a force nearly as large as that of the military that is not subject to military discipline. In other nations, making contractors subject to military discipline in a combat zone is not uncommon, but

the Supreme Court has at least partially foreclosed that remedy for the United States. However, even if the modification to the UCMJ is effective for common crime, the most pressing issue for the military commander in Iraq well may be winning the hearts and minds of the populace. For that, discipline with respect to casual contact is necessary.

A Soldier can be prosecuted for failing to follow a lawful order or general regulation or for conduct bringing discredit on the Service. Accordingly, a commander might reasonably prescribe the manner in which troops interact with the indigenous populace. It is far from clear, and even doubtful, that a civilian can be held to a similar standard. At least one logical first step might be a code of conduct developed by private industry and the Departments of Defense and Justice. It would also seem to call for an examination of the sufficiency of U.S. criminal laws in the conflict environment. While it is difficult to imagine a disciplinary remedy that will handle all the issues, a modification to MEJA, coupled with a code of conduct for civilians accompanying the force, is probably a better long-term option than use of the UCMJ for the issues arising in Iraq.

Question of status: A troublesome issue is the status of the contractor on the battlefield, and status brings with it an issue for use of force. The laws of armed conflict are clear in stating that civilians may not be military targets because they are not combatants. Today, however, when the Predator drone may be controlled by a civilian, and when the contractor maintains the weapons systems on the battlefield, lines begin to blur.

Additionally, there is no clear understanding of who may be armed in the conflict environment. Contracts generally provide that civilians must obtain explicit approval of the theater commander to be armed. However, two major contractors have taken the position that the restriction does not apply to their subcontractors.²⁶ If contractors carry weapons on the battlefield, they may be considered combatants, but because they are not in uniform, operating under military discipline, they would not be *lawful* combatants.²⁷ Even if contractors do not engage in combat, wearing military-style clothing and body armor blurs perceptions. Furthermore, rules of engagement are designed to be exercised under military discipline. By definition, there are no rules of engagement for use of force by civilians. Everyone has the right to self-defense, but who determines what that is? The use of force by civilians, except in self-defense, would seem to be a subject dealt with by ordinary criminal law—and that would be the criminal law of whatever jurisdiction has physical custody of the civilian.

Potential for a constitutional conflict: Finally, even aside from the issues of inherently governmental activity, two additional issues potentially of a constitutional dimension arise from the spate of privatization: accountability and separation of powers. Regarding the first, the more privatization is used, the greater the distance between both executive and congressional oversight of public money. That fact alone begs for implementation of some of the SIGIR recommendations that would concentrate both oversight and process.

Of somewhat greater concern, thought theoretical, is the fact that use of private industry to accomplish military-related tasks begins to resemble a shadow foreign policy mechanism. At the very least, oversight by Congress of private industry activities is attenuated. At the far end of that issue is a separation of powers question related to executive accountability to Congress. Just as the war on terror is generating constitutional tests for executive authorities for detentions, interrogations,

and surveillance, it may yet generate a test of executive authority to outsource functions previously performed by the Armed Forces.

The proliferation of contractors in the combat arena demands that the United States come to terms with the absence of a legal regime that accounts for armed contractors in a conflict environment. The number of contractors has grown from approximately 1 for every 500 military in the Gulf War to 1 for every 1.5 military in Iraq. That growth has come so quickly that procedures, regulations, and the legal regime are deficient. Lacking also is a clear understanding of the responsibility of the U.S. military to protect private contractors in the battlespace. An occupying power has responsibility for all within its control, but the United States is no longer an occupying power in either Afghanistan or Iraq.

This growth of private individuals in a conflict environment may call for national legislation—perhaps something on the order of an enabling statute for a regulatory scheme. However, even that would be a half-measure. National legislation is not binding on adversaries or even friendly governments that may find themselves with custody of such an armed contractor. Under current international law, that contractor may not be considered a lawful combatant and, depending on the circumstances, may even be found to be an unlawful combatant by other powers.

The bottom line is that this issue deserves consideration at an international level, and the United States should begin that dialogue—perhaps initially with the North Atlantic Treaty Organization nations, since the Alliance now commands in Afghanistan. Enabling national legislation and a regulatory framework could help to focus international discussion.

Notes

¹ See “Understanding the Privatization of National Security,” McCormick Tribune Conference Series, 2006.

² Ian Traynor, “The Privatization of War,” *The Guardian*, December 10, 2003.

³ Defense Federal Acquisition Regulation Supplement, “Contractor Personnel Supporting a Force Deployed Outside the United States,” § 252.225–7040, 70 Federal Regulation at 23802. See *Federal Register* 70, no. 86 (May 5, 2005).

⁴ Peter W. Singer, “Outsourcing War,” *Foreign Affairs*, March 1, 2005. However, this number is dwarfed by the overall numbers of civilian contractors in the battlespace.

⁵ Statement of Clifford G. Mumm, president of Bechtel Infrastructure Corporation, before the Committee on Government Reform, U.S. House of Representatives, September 26, 2006.

⁶ Tom Davis, Chairman of the Government Reform Committee, opening statement in a hearing on “Acquisition Under Duress: Reconstruction Contracting in Iraq,” U.S. House of Representatives, September 28, 2006.

⁷ Available at <www.prwatch.org>. CMD is a nonprofit, U.S.-based media research group that tends to be highly critical of the Bush administration. However, many of the findings of the CMD report agree with those of a report by the Special Inspector General for Iraq Reconstruction.

⁸ Kellogg Brown and Root performed so poorly repairing pipelines that the contracts were let with other companies to finish their work. See Chris Shumway, “US Blames Own Contracting Rules for Iraq Reconstruction Failures,” *The New Standard*, available at <<http://newstandardnews.net/content/index.cfm/items/1691>>.

⁹ Institute for Southern Studies, “New Investigation Reveals ‘Reconstruction Racket’ in Iraq,” January 21, 2004, available at <www.southernstudies.org/>.

¹⁰ The Special Inspector General for Iraq Reconstruction was a time-limited appointment, but legislation to extend the appointment was approved on December 8, 2006.

¹¹ Davis.

¹² Jenny Mandel, “Contracting problems cited for Iraq constructions failures,” September 28, 2006, available at <www.govexec.com>.

¹³ Matt Kelley, “U.S. Contractors in Iraq Fined,” Associated Press, April 26, 2006.

¹⁴ Available at <www.pbs.org/wgbh/pages/frontline/shows/warriors/view/>.

¹⁵ William Solis, director, Defense Capabilities and Management, Government Accountability Office, before the Subcommittee on National Security, Emerging Threats, and International Relations, Committee on Government Reform, House of Representatives, June 13, 2006.

¹⁶ Blackwater security personnel were paid \$500 per day, but Blackwater billed at between \$815 and \$1,075 per day, not counting food, housing, and insurance. See memorandum by the majority staff, House of Representatives, Committee on Oversight and Government Reform, dated February 7, 2007, and made part of the record, “Hearing on Reliance on Private Military Contractors in Iraq, Reconstruction,” February 7, 2007.

¹⁷ See Ann Scott Tyson, “Private Security Workers Living on Edge in Iraq,” *The Washington Post*, April 23, 2005.

¹⁸ Renae Merle, “Census Counts 100,000 Contractors in Iraq,” *The Washington Post*, December 5, 2006.

¹⁹ Opening statement of Representative Henry A. Waxman, chairman, Committee on Oversight and Government Reform for Hearings of February 7, 2007, n. 25.

²⁰ David R. Baker, “Bechtel ends Iraq rebuilding after a rough three years,” *San Francisco Chronicle*, November 1, 2006.

²¹ See Shumway, n. 12.

²² See Steve Fainaru, “Four Hired Guns in an Armored Truck, Bullets Flying, and a Pickup and a Taxi Brought to a Halt. Who Did the Shooting and Why?” *The Washington Post*, April 15, 2007, A1.

²³ *Reid v. Covert*, 354 U.S. 1 (1957), is a landmark case in which the U.S. Supreme Court ruled that the Constitution supersedes international treaties. According to the decision, “This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty,” although the case itself was with regard to an executive agreement and the treaty has never been ruled unconstitutional.

²⁴ Memorandum, n. 25.

²⁵ Griff Witte, “New Law Could Subject Civilians to Military Trial,” *The Washington Post*, January 15, 2007.

²⁶ Memorandum, n. 25.

²⁷ Article 3 of the 4th Geneva Conventions governs this arena. Basically, a lawful combatant is an individual authorized by governmental authority or the law of armed conflict to engage in hostilities. A lawful combatant may be a member of a regular armed force or an irregular force.

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